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October 21, 2011

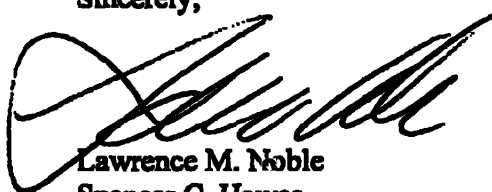
**Jeff S. Jordan
Supervisory Attorney
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463**

RE: Response to Complaint in MUR 6493

Dear Mr. Jordan:

Attached please find the response of Fox News Channel, Rupert Murdoch, Roger Ailes, and Michael Clemente (collectively, "Respondents") to the Federal Election Commission's notification of the complaint filed by Fred S. Karger, which has been designated MUR 6493. Please note that we are including a copy of the signed Clemente Declaration. We will forward you the original as soon as we get it early next week. Two copies of the response are enclosed; we respectfully request the FEC return a stamped copy of the response for our files.

Sincerely,



**Lawrence M. Noble
Spencer C. Hawes
Attorneys for Respondents
Fox News Channel and Messrs.
Murdoch, Ailes, and Clemente**

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**BEFORE THE
FEDERAL ELECTION COMMISSION**

In the matter of:

Fox News Channel, et al.

MUR 6493

RESPONSE TO COMPLAINT

This memorandum is the response of Fox News Channel, Rupert Murdoch, Chairman and CEO of News Corporation, Roger Ailes, President of Fox News Channel, and Michael Clemente, Senior Vice-President of News at Fox News Channel (collectively "Respondents") to the Federal Election Commission's (the "FEC" or "Commission") notification of the complaint filed by Fred S. Karger, which has been designated MUR 6493. As the following demonstrates, the complaint is without merit and fails to show any basis for a finding of reason to believe that the Respondents, either collectively or individually, violated the Federal Election Campaign Act of 1971, as amended ("FECA").

1. INTRODUCTION

On August 11, 2011, Fox News Channel held a debate in Ames, Iowa, for candidates seeking the Presidential nomination of the Republican party (the "Debate"). Fox News Channel utilized objective criteria to determine participants for the Debate, requiring only that the candidate: (1) be registered with the FEC as a presidential exploratory committee or campaign, (2) meet all U.S. Constitutional requirements; and (3) has garnered at least an average of one percent in five national polls based on most recent polling leading up to the registration day. *Rules Outlined for the Iowa Republican Debate on Aug. 11*, Des Moines Register, July 23,

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2011. These criteria set a very low threshold for participation. Nevertheless, Mr. Karger did not meet the minimum requirements to qualify for the Debate.

While it is understandable Mr. Karger would be disappointed in this outcome, his complaint, alleging Respondents applied subjective criteria to purposefully exclude him from the debate, and in so doing violated FECA by making an in-kind corporate contribution to the participating candidates, is without merit. The same objective criteria were applied in the same manner to every candidate that sought to participate in the Debate, including Mr. Karger. As a result, Respondents met the requirements established by the FEC for corporate sponsorship of a debate. Respondents did not wrongfully exclude Mr. Karger, and Respondents did not violate FECA.¹

2. THE COMPLAINT DOES NOT ALLEGE A VIOLATION OF FECA BY MESSRS. MURDOCH AND AILES

As an initial matter, while Mr. Karger named Rupert Murdoch and Roger Ailes as Respondents, he made no specific factual allegations regarding the activities of either individual. Rather, the complaint only references the actions of Mr. Clemente, who was the individual Respondent responsible for developing and approving the Debate's eligibility criteria. In fact, neither Mr. Murdoch nor Mr. Ailes played a role in the development or application of the Debate eligibility criteria, or in the decision that Mr. Karger failed to satisfy these criteria. Declarative of Michael Clemente ("Clemente Deal.") ¶ 3. Consequently, there is not even an allegation of reason to believe that Mr. Murdoch or Mr. Ailes violated FECA, and the complaint should be dismissed as to them.

¹ It should be noted that while Fox News Channel complied with the FEC's debate regulations in staging the Iowa debate, Fox News Channel is a media entity engaging in news and commentary within the press exemption. 2 U.S.C. § 431(9)(B)(i); 11 CFR §100.42. The FEC has never suggested that a news entity cannot use its broad editorial judgment to invite one, two or six candidates to sit down for a televised interview or question and answer session unless it complies with the debate regulations.

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3. THE ELIGIBILITY CRITERIA CLEARLY MET THE REGULATORY REQUIREMENTS FOR DETERMINING DEBATE PARTICIPANTS

Mr. Karger does not dispute that the criteria applied to him by Fox News Channel were valid under FECA. Rather, he claims Respondents applied the criteria subjectively in order to exclude him. However, an initial review of how the criteria complied with FECA and the FEC's regulations will help show the criteria were applied properly to Mr. Karger.

A. The Criteria Were Objective Pursuant to the FEC Regulations

In 1995, the FEC adopted regulations at 11 C.F.R. §110.13 and §114.4(f) that provided a specific exception to the campaign finance law so that "the news media may stage debates, without being deemed to have made prohibited corporate contributions to the candidates taking part in the debates." *FEC Explanation and Justification*, 60 Fed. Reg. 64261. Among these rules, 110.13(c) requires an organization staging a debate to use objective, pre-established criteria for determining participants. The Commission has stated these regulations were intended "to reduce a debate sponsor's use of its own personal opinions in selecting candidates." *Statement of Reasons* at 7, MURs 4451 and 4473. However, at the same time, the FEC wanted to avoid the government becoming entangled in the decision making process of the media, so "[t]he choice of which objective criteria to use is largely left to the discretion of the staging organization." *FEC Explanation and Justification*, 60 Fed. Reg. 64262.

Here, Fox News Channel and Mr. Clemente adopted criteria requiring only that the candidate: (1) be registered with the FEC as a presidential exploratory committee or campaign, (2) meet all U.S. Constitutional requirements; and (3) has garnered at least an average of one percent in five national polls based on most recent polling leading up to the registration day. *Rules Outlined for the Iowa Republican Debate on Aug. 11*, Des Moines Register, July 23, 2011.

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Not only are these elements easily quantifiable and insulated from the personal opinions of the sponsoring organization, but the FEC has approved of far more subjective criteria in the past. In MURs 4451 and 4473, the Commission found no issue with the Commission on Presidential Debates' ("CPD") eligibility criteria for potential third-party participants. These criteria included "signs of national newsworthiness and competitiveness" and "indicators of public enthusiasm," factors that were in large part determined by evaluating a mixture of polling data and the opinions of political scientists, reporters, and commentators. Compared to the criteria at issue in this matter, a much higher degree of subjectivity was inherent in these CPD criteria by virtue of their reliance on the opinions of individuals. Consequently, the criteria used for the Debate met the FEC's requirement for objectivity.

B. The FEC's Regulations Allow Debate Sponsors to Use Criteria Designed to Exclude Candidates that Appear to Have Very Little Chance of Winning Election

In the Statement of Reasons accompanying MURs 4451 and 4473, the FEC reasoned that even the reliance of the CPD's criteria on external opinion was acceptable on grounds it was consistent with the regulations "for a debate sponsor to consider whether a candidate might have a reasonable chance of winning through the use of outside professional judgment." *Statement of Reasons* at 7, MURs 4451 and 4473. Similarly, here, Fox News Channel's use of a 1% polling threshold was reasonably designed to exclude those candidates who truly appeared to have no chance of winning the Republican nomination. In so doing, instead of relying on the subjective judgment of outside "experts," Fox News Channel appropriately identified those sources of polling results it believed would provide current and reliable polling data. As part of that process, out of date polls were excluded because the most current polling is inherently a better measure of a candidate's current chance of winning the

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nomination than older polls. Online polls were excluded because they are widely regarded as having less accuracy than standard telephone polling.² Clemente Decl. ¶ 6. For example, the American Association for Public Opinion Research states in a FAQ on its website that "Surveys based on self-selected volunteers [such as many online polls] . . . are subject to unknown, non-measurable biases."³ Similarly, the Pew Research Center notes that most online polls do not have a proven record of accuracy, and that "online polls can be seriously biased if people who hold a particular point of view are more motivated to participate than those with a different point of view."⁴ The Pew Research Center conducts most of its polling via the telephone.⁵

The FEC has noted "the debate regulations sought to give debate sponsors wide leeway in deciding what specific criteria to use." *Statement of Reasons* at 8, MLRs 4451 and 4473. Fox News Channel used criteria that were objective, inclusive, easily quantifiable, and created no advantage for certain candidates over others. Given the criteria the Commission has accepted in the past, along with the wide discretion afforded debate sponsors, the criteria at issue here are unquestionably valid under the FEC's regulations.

² While Mr. Karger attempts to dispute this point, the two sources he cites are of little help to his position. First, he cites a June 6, 2010, blog post by Nate Silver, which Mr. Karger claims shows the Harris Interactive online polls to be among the most reliable. In reality, Mr. Silver's post states that the best indicator "for evaluating the effectiveness of different pollsters on a going-forward basis" is a statistic called "Pollster-Introduced-Error" or PIE. Mr. Silver's accompanying statistics, which are included in the complaint, show Harris Interactive to have one of the worst PIE numbers of the listed pollsters. Second, Mr. Karger includes a journal article that claims internet polls are accurate. This article, however, is from 2001 and studies results from the 2000 U.S. elections. As noted above, online polls have not become widely accepted as equal to their telephonic counterparts in the intervening decade.

³ http://www.aapor.org/Ofc_In_Surveys_and_Margin_of_Error1.htm

⁴ <http://pewresearch.org/pubs/1770/ask-the-expert-pew-research-center#online-poll-accuracy>

⁵ *Id.*

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4. **RESPONDENTS APPLIED ONLY PRE-ESTABLISHED OBJECTIVE CRITERIA TO KARGER'S APPLICATION TO PARTICIPATE IN THE DEBATE AND THUS DID NOT MAKE AN ILLEGAL CONTRIBUTION**

Mr. Karger's complaint attacks Fox News Channel's exclusion of certain polls as evidence both that its debate criteria were flawed and applied in a manner designed to exclude Mr. Karger. However a review of the allegations and Fox News Channel's standards shows these claims to be without merit.

i. **Exclusion of Online Polls**

Mr. Karger alleges that because the original press release specifying the Debate's eligibility criteria did not note that online polls would not be accepted, Respondents must have decided to implement this criteria at a later time in order to exclude Mr. Karger. In actuality, the press release containing the eligibility criteria did not state this fact because, as noted above, online polls are generally not considered to be qualitatively similar to other accepted polling methods. Clemente Decl. ¶ 6. Indeed, it was widely understood at Fox News Channel that online polls would not be accepted to meet the 1% threshold. Clemente Decl. ¶ 5.

While Mr. Karger is correct that Fox News Channel does reference online polls in some of its reporting, it does so in matters where, in its editorial judgment, the online poll is news worthy. However, reporting on the results of an online poll is very different than using such a poll as a bright-line part of the objective criteria used to decide who may participate in a presidential primary debate. Here, the polling threshold was quite small – 1 percent – and thus the use of accepted, standardized polling methods was important, making online polls inappropriate for this purpose. Fox News Channel and Mr. Clemente did not think it necessary to state this point, just as they did not think it necessary to state that a poll taken of the attendees at a candidate's rally or by call-in to a radio show would not be acceptable.

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Additionally, while the FEC has stated that debate sponsors are encouraged to write down eligibility criteria, they are not required to do so. *FEC Explanation and Justification*, 60 Fed. Reg. 64262. Hence, the fact the criteria did not state online polls were unacceptable is not a violation in itself, no matter the nefarious inferences Mr. Karger tries to draw from it.

Furthermore, while Mr. Karger's complaint argues online polls are valid and cites Fox News Channel's reference to them in other contexts, these points are irrelevant to Mr. Karger's claim that in this particular case, Fox News Channel imposed this requirement to wrongly exclude Mr. Karger. Mr. Karger offers absolutely no pertinent evidence or specific allegations to support his claim that the exclusion of online polls was imposed subjectively or surreptitiously by the Respondents. Consequently, it cannot be found there is a reason to believe any violation occurred in this regard as there is simply no evidence to support it.

ii. Requiring Recent Polls

The Debate eligibility criteria stated that to participate, a candidate must have "garnered at least an average of one percent in five national polls based on most recent polling leading up to the registration day." *Rules Outlined for the Iowa Republican Debate on Aug. 11*, Des Moines Register, July 23, 2011 (emphasis added). Yet, despite the clear statement that candidates would be required to use the most recent polling data to meet the 1% threshold, Mr. Karger still alleges the Respondents used this requirement to specifically exclude him.

As support, Mr. Karger claims that Gary Johnson was admitted to a prior Fox News Channel-sponsored debate in South Carolina on the basis of out-of-date polling data. However, Mr. Karger makes no claim he himself was wrongly excluded from the South Carolina debate, nor that Gary Johnson was improperly admitted to the Iowa debate at issue in the complaint. In fact, Gary Johnson failed to meet the eligibility for the Iowa debate. Quite simply,

Mr. Karger's allegations regarding Mr. Johnson are wholly irrelevant to his claim here.

Furthermore, Mr. Karger makes no claim that any candidate was admitted to the Iowa debate on the basis of an outdated poll, nor does he make any other allegations about how this factor was unfairly or subjectively applied to him compared to the other participants in the Iowa debate.

In short, Mr. Karger alleges the most recent polling requirement was applied improperly to exclude him, but as support he offers only immaterial claims about another candidate in an entirely separate debate. Mr. Karger makes no allegations about how this requirement was applied in Iowa debate generally or to him specifically. As a result, there are no grounds to find this factor was differently applied to Mr. Karger than the qualifying participants in the Iowa debate.

iii. McClatchy-Marist Poll

Finally, while Mr. Karger does not directly challenge the exclusion of the McClatchy-Marist poll, which showed support for Mr. Karger between 0% and 1%, it is worth noting the response Mr. Karger received from Fox News Channel shows that this poll was properly taken into account. The poll simply failed to show Mr. Karger had the necessary support to meet the eligibility criteria. Fox News Channel's response addressed first why the three online polls were impermissible, then why the outdated poll could not be used. This left Mr. Karger with only the McClatchy-Marist poll, and thus unable to produce a single acceptable poll showing him at 1%. This was, in short, the point of the response, noting to Mr. Karger that he failed to meet the necessary criteria. Additionally, even if this poll had shown Mr. Karger at the threshold, it would have had no impact on the decision as Mr. Karger would still have been four polls short of the requisite number to participate.

5. CONCLUSION

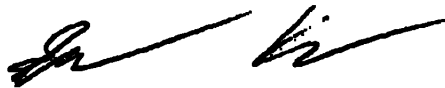
For the foregoing reasons, Respondents respectfully request the Commission find "no reason to believe" a violation has occurred and dismiss this matter in its entirety.

DATED: October 21, 2011

Respectfully submitted,



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